No. 12515

Office - Supreme Court, U.S.
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JUN 5 1958
JOHN T. FEY, Clerk

United States Court of Appeals

For the Third Circuit

THE MANUFACTURERS LIFE INSURANCE COMPANY,

Plaintiff-Appellee,

AGAINST

ALBERT BARNETT KLEPPER and EDWARD SCHNUR,

Defendants-Appellants,

AND

TANNER ASSOCIATES, INC., and MARIE M. CONSTANT,

Defendants.

APPEAL FROM JUDGMENT OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

APPELLANTS' BRIEF AND APPENDIX

ALBERT BARNETT KLEPPER

and

EDWARD SCHNUR,
Defendants-Appellants,
pro se.
82 Wall Street,
New York 5, N. Y.
DIgby 4-8045.

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Questions Involved

1. Did the District Court of New Jersey commit error in assuming jurisdiction over the *res*, after the institution of a prior pending action in the Supreme Court of the State of New York, County of Kings, in which jurisdiction over the *res* had been secured; and, the state interpleader statute afforded ample relief in a binding action?

2. Did the District Court of New Jersey commit error in retaining jurisdiction, and permanently enjoining New York residents, who did not waive the defense that the Court did not have jurisdiction over them to render judgment *in personam?*

3. As a matter of law and equity did the District Court of New Jersey commit error in disregarding the objections of three of the four defendants to the assumption of jurisdiction; and the fact that the only remaining defendant could receive full payment of its asserted claim?

Statement of Facts

On October 31, 1957, an action was instituted by Albert Barnett Klepper, as assignee of a life insurance policy to recover $25,000.00 against the Manufacturers Life Insurance Company in the Supreme Court of the State of New York, County of Kings.

On November 1, 1957, $25,000.00 in funds of the Manufacturers Life Insurance Company, pursuant to a writ of attachment issued by the Supreme Court of the State of New York, County of Kings were attached.

On November 4th, 1957, the summons and verified complaint in the Supreme Court of the State of New York, County of Kings were served on the Manufacturers Life Insurance Company. The time of the defendant Manufacturers Life Insurance Company to answer the State Court action, has been extended until the determination of the appeal herein.

On November 19th, 1957, the District Court of New Jersey restrained the defendant from prosecuting the pending action in the Supreme Court of the State of New York, County of Kings.

On December 9th, 1957, over the objections of three of the four defendants the District Court of New Jersey, permanently enjoined and restrained the prosecution of the pending State action, and directed interpleader.

On December 13th, 1957, the defendants Albert Barnett Klepper and Edward Schnur, filed notice of appeal and a stipulation extending their time to answer until the determination of this appeal.

Albert Barnett Klepper a New York attorney and Edward Schnur are both residents of the State of New York,

and opposed the assumption of jurisdiction by the District Court of New Jersey, on the grounds that the Supreme Court of the State of New York, County of Kings had jurisdiction over the *res* in a prior pending action, and, the New York interpleader statute afforded ample relief in a binding action. Further, that they did not waive the defense that as residents of the State of New York, the District Court of New Jersey did not have jurisdiction over them to render judgment *in personam*.

Marie M. Constant, likewise opposed and asserted that a second action was improper and unnecessary, especially since the only defendant, Tanner Associates Inc., who desired a second forum, could receive immediate payment in full of its asserted claim.

It is respectfully submitted that in accordance with law, and as a matter of equity, the Court should have vacated the restraining order and dismissed the interpleader.

THE ARGUMENT

POINT I

The State Court first acquired control of the *res*, and, the state interpleader action afforded ample relief.

The plaintiff in his complaint (5a) alleged that its funds in the State of New York were attached, prior to the institution of the action in the District Court, in a pending action in the Supreme Court of the State of New York, County of Kings.

Sections 285, 286 and 287 of the Civil Practice Act of the State of New York, afford ample relief in a binding action (9a).

In *Flanagan* v. *Marvel*, 94 Fed. Supp. 145 the Court vacated and set aside the restraining order heretofore issued, and, dismissed the plaintiff's interpleader holding that the State interpleader action afforded plaintiff ample opportunity for relief in his position as stakeholder, and, there was no equitable basis for assumption of jurisdiction by a Federal Court, stating (p. 148):

> "where the jurisdiction of the state court has first attached, the federal court is precluded from exercising its jurisdiction over the same res to defeat or impair the state court's jurisdiction. Kline v. Burke Construction, 260 U. S. 229, 43 S. Ct. 79, 82."

It is well settled law that where a State Court first acquires control of the *res*, the Federal Courts are disabled from exercising any power over it by injunction or otherwise.

> *Palmer* v. *Texas*, 212 U. S. 118;
> *Tocey* v. *New York Life Insurance Co.*, 314 U. S. 118.

POINT II

The District Court of New Jersey had no jurisdiction over the two New York defendants, who did not waive that defense.

The defendants Albert Barnett Klepper, a New York attorney, and Edward Schnur, both residents of the State of New York, objected to the assumption of jurisdiction by the District Court of New Jersey.

Section 1335, Title 28, U. S. C. A. specifically confers jurisdiction upon the District Courts in interpleader suits.

In *Mosely* v. *Sunshine Biscuits*, 170 F. Supp. 164, the Court construed Sections 28 U. S. C. A., ¤1335, 1397 and

2361 and held the Federal Court in Missouri had no jurisdiction of a New York defendant where the defendant did not waive the defense that the Court did not have jurisdiction of the parties.

In *Hogan* v. *Central Avenue Dairy Inc.*, 180 F. 2d 502, the Circuit Court held that since one of the claimants did not waive, even though the Court did have jurisdiction of the subject matter, the District Court was without jurisdiction of the parties to render a judgment *in personam*, and the motion to dismiss should be sustained.

In *Hogan* v. *Central Avenue Dairy*, 180 Fed. 2d 502 (Circuit Ct., 9th Dist.), raised the scope of the jurisdiction of District Courts in an interpleader action and said:

> "Furthermore, if Congress had so provided there is no reason why process from the United States District Court could not run country-wide. But Congress has not so provided, generally, and a District Court's power, to hear and decide cases involving personal liability of an individual is limited to those served within the state where the court sits."

POINT III

The District Court as a matter of law and equity committed error in disregarding the objections of three of the four defendants, since the fourth defendant's claim of $8,225.83, could be paid from the fund of $25,000.00.

The purpose of 28 U. S. C. A. #1335 was to give a stakeholder protection, by preventing a multiplicity of suits and circuity of action, but in nowise to change rights of claimants by its operation.

New York Life Ins. Co. v. *Lee*, C. A. 9th, 232 Fd. 2d 811;
Federal Rules of Civil Procedure, Rule 22.

Albert Barnett Klepper, Edward Schnur and Marie M. Constant undertook to pay to Tanner Associates Inc., the only remaining defendant the full amount of his asserted claim in the sum of $8,225.83 from the fund of $25,000.00.

It is elementary that to have adverse claims, the claims in the aggregate must exceed the fund that may be available for their payment.

First State Bank of Chariton, Iowa v. *Citizens Bank of Thedford*, 10 F. R. D. 424.

Since the claim of the only defendant who urged the retention of jurisdiction by the District Court, was less than the fund available for its payment, the District Court should have declined jurisdiction, especially since it was aware that the State interpleader statute afforded the stakeholder ample opportunity for relief in a binding action, in which it had already assumed jurisdiction over the *res*.

Flanagan v. *Marvel*, 94 F. Supp. N. J.

Conclusion

The retention of jurisdiction by the District Court of New Jersey and the permanent injunction against the New York residents was arbitrary, clearly erroneous, unsupported by and contrary to the evidence and contrary to law and should be reversed and the interpleader dismissed.

Respectfully submitted,

ALBERT BARNETT KLEPPER
AND EDWARD SCHNUR,
Defendants Pro se.

A

Docket Entries

Civil 1145-57 Docket — Judge Wortendyke

Title of Case

—o—

The Manufacturers Life Insurance Company,
Plaintiff,

vs.

Albert Parnett Klepper, Edward Schnur, Tanner Associates, Inc., and Marie M. Constant,
Defendants.

—o—

Attorneys

For Plaintiff: McCarter, English & Studer, Esqs., 11 Commerce St., Newark

For Defendant: Franzblau & Franzblau, Esqs. (M. M. C.), 60 Park Pl., Newark, Eugene P. Kenny, Esq. (Tanner Associates), 880 Bergen Av., Jersey City, 6

Basis of Action: Interpleader

Date	*Filings—Proceedings*
11-19-57	Complaint filed.
11-19-57	$25,800.00 deposited in Registry.
11-19-57	Clerk's Certificate of Cash Deposit filed.
11-19-57	Temporary restraining order and order to show cause returnable Nov. 25, 1957 filed. (Wortendyke) Notice mailed.
11-19-57	Summons issued.
11-19-57	Notice of Allocation and Assignment filed. (Newark—Wortendyke)
11-27-57	Hearing on plaintiff's application for preliminary injunction. Ordered application grant. Order to be submitted. Ordered hearing continued to 12-9-57. (Wortendyke) (11-25-57)
11-27-57	Affidavit of Alexander J. Alexander filed 11-25-57.
11-27-57	Affidavit of Andrew J. Dritsas filed 11-25-57.

Docket Entries

Date	*Filings—Proceedings*
12- 2-57	Summons returned served on Marie M. Constant on 11-19-57; served Edward Schnur on 11-21-57; served Tanner Associates, Inc., on 11-20-57; returned not served as to Albert Barnett Klepper, filed
12- 4-57	Letter requesting issuance of Alias Summons as to Albert Barnett Klepper, filed
12- 4-57	Alias summons issued as to Albert Barnett Klepper.
12- 4-57	Affidavit of Albert Barnett Klepper, filed
12- 9-57	Answer of Marie M. Constant, filed
12- 9-57	Affidavit of Nathaniel W. Franzblau, filed
12-10-57	Hearing on plaintiff's application to settle form of order for preliminary injunction. (Wortendyke) (12-9-57)
12-10-57	Ordered time to file answers for all claimants be extended to 1-15-58. Order to be submitted. (Wortendyke) (12-9-57)
12-10-57	Alias summons returned served on Albert Barnett Klepper on 12-6-57, filed 12-9-57
12-10-57	Interlocutory judgment discharging plaintiff from all further liability; for permanent injunction without costs; and for payment of Counsel fee out of registry, filed 12-9-57 (Wortendyke) Notice mailed.
12-10-57	Affidavit of Nicholas Conover English, filed 12-9-57
12-16-57	Notice of Appeal as to Albert Barnett Klepper and Edward Schnur filed 12-13-57
12-16-57	Copies forwarded to Clerk, U.S.C.A., McCarter, English & Studer, Esqs., Franzblau & Franzblau, Esqs., and to Eugene P. Kenny, Esq.
12-16-57	Stipulation and order extending time of Albert Barnett Klepper and Edward Schnur to answer until determination of appeal, filed 12-13-57 (Wortendyke) Notice mailed.
1- 6-58	Answer of Tanner Associates, Inc., filed 1-3-58
1-10-58	Record on Appeal forwarded to Clerk, USCA.

APPENDIX

Order to Show Cause and Restraint

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No.

———o———

[SAME TITLE]

———o———

Upon the filing of the complaint herein and the payment into the Registry of this Court by the plaintiff of the sum of $25,000.00, and good cause appearing,

IT IS ORDERED, on this 19th day of November, 1957, on motion of McCarter, English & Studer, attorneys for plaintiff, that the defendants, and each of them, show cause before this Court, at the Federal Building, Newark, New Jersey, at 10 o'clock in the forenoon, on Monday the 25th day of November 1957, why the said defendants should not interplead; why the defendants, their agents and attorneys, should not be permanently restrained and enjoined from instituting or prosecuting any proceeding in any state or United States court affecting said Policy No. 1,254,339 or the proceeds thereof; why the plaintiff should not be discharged of all further liability respecting Policy No. 1,254,339 or the proceeds thereof, and why the plaintiff should not be awarded a counsel fee and its costs to be taxed.

Order to Show Cause and Restraint

AND IT IS FURTHER ORDERED that the defendant Albert Barnett Klepper, his agents and attorneys, be and they hereby are enjoined and restrained from prosecuting the action now pending against plaintiff in the Supreme Court of the State of New York, County of Kings, which action is entitled "Albert Barnett Klepper, Plaintiff against The Manufacturers Life Insurance Company, Defendant" and which bears Index No. 13922, Year 1957, until the further order of this Court.

AND IT IS FURTHER ORDERED that the defendants, Albert Barnett Klepper, Edward Schnur, Tanner Associates, Inc., and Marie M. Constant, and each of them, their officers, agents and attorneys, be and they hereby are enjoined and restrained from instituting or prosecuting any proceeding in any state or United States court affecting said Policy No. 1,254,339 or the proceeds thereof, until the further order of this Court.

AND IT IS FURTHER ORDERED that a true but uncertified copy of the complaint and of this order may be served upon Andrew J. Dritsas, attorney for defendant Albert Barnett Klepper.

REYNIER J. WORTENDYKE, JR.
U. S. D. J.

Done at Newark, N. J.

Nov. 19, 1957 at 10:20 A. M.

Complaint in Interpleader

UNITED STATES DISTRICT COURT

District of New Jersey

Civil Action No.

—o—

[SAME TITLE]

—o—

Plaintiff, The Manufacturers Life Insurance Company, by way of complaint says that:

1. Plaintiff is a corporation existing under the laws of Canada and is duly qualified to transact the business of life insurance in the State of New Jersey.

2. Defendant Albert Barnett Klepper, upon information and belief, is a resident and citizen of the State of New York and maintains his office at 82 Wall Street, New York City. Defendant Edward Schnur is a resident and citizen of the State of New York and resides at 5114 Beverly Road, Brooklyn, New York. Defendant Tanner Associates, Inc. is a New Jersey corporation and is a citizen of New Jersey having its principal office at 880 Bergen Avenue, Jersey City, New Jersey. Defendant Marie M. Constant is a citizen and resident of New Jersey and resides at 80 Lincoln Avenue, Long Branch, New Jersey.

3. This action arises under 28 U. S. C. § 1335.

4. Under date of July 22, 1953 plaintiff issued its policy No. 1,254,339 in the face amount of $25,000 on the life of

Menander T. Constant as insured. Defendant Marie M. Constant, wife, was designated beneficiary.

5. Under date of February 8, 1956, the insured appointed as beneficiary "Edward Schnur, residing at 5114 Beverly Road, Brooklyn, New York, as first mortgagee." The said Edward Schnur is one of the defendants herein.

6. Under date of February 8, 1956, the said insured and defendant Marie M. Constant executed a written assignment of said policy to "Albert Barnett Klepper, Attorney at Law, 82 Wall Street, New York 5, New York." Said Albert Barnett Klepper is one of the defendants herein.

7. Under date of February 8, 1956 the defendant Albert Barnett Klepper executed a letter to the insured in which he said in part:

> "I have this day received an assignment of policy and the appointment of beneficiary, together with the original life insurance policy issued by the Manufacturers Life Insurance Company, policy #1,254,339, which I will hold in escrow until the repayment in full of a first mortgage to Edward Schnur and a second mortgage to Abraham and Tillie Weiner.
>
> "It being understood that said policy together with the assignment and appointment of beneficiary will be returned to you upon full payment of both of said mortgages."

8. On September 27, 1957, the insured, Menander T. Constant, died.

9. Under date of October 9, 1957, Abraham Weiner and Tillie Weiner executed an assignment to defendant Tanner Associates, Inc. of all their "right, title and interest in and to the proceeds of insurance policy No. 1,254,339 issued by The Manufacturers Life Insurance Company on the life of Menander T. Constant, to whatever extent we may be entitled thereto, which policy is now held in escrow by Albert Barnett Klepper to secure the payment of a first mortgage held by Edward Schnur on the premises on which the within assigned mortgage is a second mortgage, and to secure the payment of the bond and mortgage assigned herein; * * *."

10. Defendant Albert Barnett Klepper as assignee of such policy, acting through his attorney Andrew J. Dritsas, Esq., of 82 Wall Street, New York 5, New York, has filed a complaint in the Supreme Court of the State of New York, County of Kings, against the plaintiff seeking recovery of the proceeds of said life insurance policy. The said action is entitled "Albert Barnett Klepper, Plaintiff, against The Manufacturers Life Insurance Company, Defendant" and bears Index No. 13922, Year 1957. Inasmuch as plaintiff is not qualified to do business in the State of New York and has no agent for the service of process in the State of New York, the said Klepper has attached a bank account of the plaintiff in the First National City Bank of New York, 55 Wall Street, New York 15, New York.

11. Defendant Tanner Associates, Inc., acting through its attorney, Eugene P. Kenny, Esq., of Jersey City, New Jersey, has demanded that plaintiff pay it the sum of $8,225.83, representing its interest in the proceeds of said policy.

Complaint in Interpleader

12. Defendant Marie M. Constant, acting through her attorney, Nathaniel W. Franzblau, of Newark, New Jersey, has made claim to plaintiff of an interest in said policy.

13. Plaintiff herewith tenders into court the sum of $25,000, representing the proceeds payable under said policy.

14. Plaintiff is unable to determine the respective interests of the defendants in the proceeds of said policy, and has no adequate remedy at law save by resort to the equitable powers of this Court under 28 U. S. C. § 1335.

WHEREFORE, plaintiff demands:

A. That this Court issue its process for all defendants.

B. That this Court enter its order restraining and enjoining defendant Albert Barnett Klepper, his agents and attorneys, from prosecuting or otherwise proceeding with his action in the Supreme Court of the State of New York, County of Kings, entitled "Albert Barnett Klepper, Plaintiff against The Manufacturers Life Insurance Company, Defendant" and bearing Index No. 13922, Year 1957" until the further order of this Court, and directing him to release from attachment the funds of plaintiff in the First National City Bank, New York, New York.

C. That this Court enter its order restraining and enjoining the defendants, and each of them, their respective agents and attorneys, from instituting or prosecuting any proceeding in any state or United States court affecting said policy No. 1,254,339, or the proceeds thereof, until the further order of this Court.

D. That upon procuring the defendants to interplead herein, the plaintiff be discharged of all further liability with respect to said policy No. 1,254,339 or the proceeds thereof.

E. That plaintiff be awarded a counsel fee and its costs to be taxed.

McCARTER, ENGLISH & STUDER,
Attorneys for Plaintiff
11 Commerce Street
Newark 2, New Jersey
By JAMES R. E. OZIAS
JAMES R. E. OZIAS,
A Member of the Firm

Affidavit of Andrew J. Dritsas

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 1145/57

—o—

[SAME TITLE]

—o—

State of New York
County of New York—ss.:

ANDREW J. DRITSAS, being duly sworn, deposes and says:

I am an attorney at law duly admitted to practice in the State of New York, and, in this Court.

I request the Court to vacate and dismiss the temporary restraining order, and, to dismiss the plaintiff's interpleader on the following grounds:

a. The Supreme Court of the State of New York, County of Kings, has already assumed jurisdiction over the res, in a pending action, and the interpleader statutes of the state afford the plaintiff as stakeholder ample relief in a binding action; and there is no equitable basis for assumption of jurisdiction by this Court.

b. Albert Barnett Klepper, a resident of the State of New York, appears specially herein, and does not waive the defense that this Court does not have jurisdiction over him to render a judgment in personam.

The plaintiff in his complaint (P. 10) alleges that its funds in the City of New York have been attached, prior to this interpleader action, in a pending action to recover

the proceeds of the life insurance policy by Albert Barnett Klepper as assignee of such policy.

Sections 285, 286 and 287 of the Civil Practice Act of the State of New York, afford the plaintiff as stakeholder ample relief in a binding action. In the case of Flanagan v. Marvel, 94 Fed. Supp. 145 the Court vacated and set aside the restraining order heretofore issued, and dismissed the plaintiff's interpleader holding that the state interpleader action afforded plaintiff ample opportunity for relief in his position as a stakeholder, and, there was no equitable basis for assumption of jurisdiction by a federal court.

At P. 148:

> "where the jurisdiction of the state court has first attached, the federal court is precluded from exercising its jurisdiction over the same res to defeat or impair the state court's jurisdiction. Kline v. Burke Construction, 260 U. S. 229, 43 S. Ct. 79, 82."

It is well settled law that where a state court first acquires control of the res, the federal courts are disabled from exercising any power over it by injunction or otherwise. Palmer v. Texas 212 U. S. 118; Toucey v. New York Life Insurance Company 314 U. S. 118; Agricultural Insurance Co. v. The Lido, Dist. Ct. Mass. 1945; 28 U. S. C. A. Sec. 379; Moore's Commentary on the U. S. Judicial Code.

Section 1335 Title 28 U. S. C. A. specifically confers jurisdiction upon the district courts in interpleader suits. Section 1397, Title 28 U. S. C. A. provides the venue of such actions as follows:

Affidavit of Andrew J. Dritsas

> "Any civil action of interpleader, or in the nature of interpleader under section 1355 of this title *may be brought*, in the judicial district in which one or more defendants reside."

In Mosely v. Sunshine Biscuits, 170 F. Supp. 16 the court construed sections 28 U. S. C. A., # 1335, 1397 and 2361 and held the Federal Court in Missouri had no jurisdiction of a New York defendant where the defendant did not waive the defense that the court did not have jurisdiction of the parties. The Circuit Court in the case of Rogan v. Central Avenue Dairy Inc. 180 F 2d 502, held that since one of the claimants did not waive, even though the court did have jurisdiction of the subject matter, the District Court was without jurisdiction of the parties to render a judgment in personam, and the motion to dismiss should be sustained. In Hogan v. Central Avenue Dairy 180 Fed 2d 502 the U. S. Circuit Ct. of Appeals 9th Dist, raised the scope of jurisdiction of district courts in an interpleader action, and said:

> "Furthermore if Congress had so provided there is no reason why process from the United States District Court could not run countrywide. But Congress has not so provided, generally, and a District Court's power to hear and decide cases involving personal liability of an individual is limited to those served within the state where the court sits."

WHEREFORE, I respectfully move this Court to vacate and dismiss the temporary restraining order, and to dismiss the plaintiff's interpleader with costs.

ANDREW J. DRITSAS

(Sworn to by Andrew J. Dritsas, November 21, 1957.)

Affidavit of Nathaniel W. Franzblau

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 1145—57

—o—

[SAME TITLE]

—o—

State of New Jersey
County of Essex—ss.:

NATHANIEL W. FRANZBLAU, being duly sworn, deposes and says:

1. I am an attorney at law of the State of New Jersey with offices at 60 Park Place, Newark, New Jersey and represent the above named defendant Marie M. Constant.

2. On September 27, 1957, Menander T. Constant, husband of Marie M. Constant, died and there was issued on his life an insurance policy in the face amount of $25,000.00 by the plaintiff company, and said Marie M. Constant was designated as beneficiary upon its issue. However, on February 8, 1956, the decedent and said beneficiary agreed to have Edward Schnur designated as beneficiary and executed an absolute assignment of the funds of the said policy to Albert Barnett Klepper, one of the defendants herein, which assignment was filed with and on the regular form of the plaintiff company. The decedent, Marie M. Constant and said assignee agreed that any funds realized from said life insurance policy was to be utilized

as collateral security for the satisfaction of a first mortgage held by said Edward Schnur and a second mortgage held by Abraham Weiner and Tillie Weiner. The said agreement was only for the benefit of the said first and second mortgagees. On October 29, 1957, subsequent to the death of Menander T. Constant, the defendant Tanner Associates, Inc., paid the full amount of the second mortgage to Abraham Weiner and Tillie Weiner and the mortgage was assigned to Tanner Associates, Inc. who, according to the Complaint filed in this cause, alleges that there is due thereon the sum of $8,225.83; that moreover, the said mortgage is in the process of foreclosure but its sale has been postponed on numerous occasions by the said Tanner Associates, Inc. without any cause. At the present posture of this matter, there is no deficiency on the aforesaid mortgages because the said mortgagees have not exhausted their remedies under the terms thereof and if there is any claim that the said mortgagees may have against the funds of the insurance policy it may be asserted against the assignee, Albert Barnett Klepper, when and if a deficiency is properly established by the duly prosecution of foreclosure suits and sales pursuant therewith.

3. Subsequent to the death of the said decedent this deponent communicated with the plaintiff company and after correspondence and conferences with its representatives acknowledged that payment should be made by it to Edward Schnur and Albert Barnett Klepper. In fact, such attitude is exemplified by a letter dated October 22, 1957, a copy of which is annexed hereto, forwarded by this deponent to the plaintiff company at its home office in Toronto, Canada and to Mr. Barrett at its office in Newark, New Jersey.

Affidavit of Nathaniel W. Franzblau

4. On behalf of the defendant Marie M. Constant I have acknowledged that payment should be made to Albert Barnett Klepper and or Edward Schnur the defendants herein because the plaintiff company had received an outright assignment to them of the funds of the policy upon the death of said Menander T. Constant. I informed the plaintiff company and its representatives that I had no objections to the payment of the said $25,000.00 accordingly; moreover, that Marie M. Constant and Tanner Associates, Inc. would have to make their claims, if any, to the defendants, Albert Barnett Klepper and Edward Schnur.

5. Subsequent to my letter of October 22, 1957 and conferences had with the plaintiff's representatives, I was surprised to learn that the plaintiff failed and refused to make payment to Albert Barnett Klepper and or Edward Schnur and as a result thereof the defendant Albert Barnett Klepper instituted an attachment suit in the Supreme Court, Kings County of the State of New York wherein I am reliably informed all the parties may assert their rights or claims. On behalf of said Marie M. Constant I refused to waive the jurisdiction of the Supreme Court of the State of New York because in my opinion it had proper jurisdiction and that the Interpleader Suit filed in this Court was unnecessary and it will cost all of the parties much additional expense and create a diminution of the funds now attached to the detriment of the parties entitled to the funds.

6. On several occasions, for the sake of expediency, this deponent has offered to Tanner Associates, Inc. the amount it claims due on the said second mortgage upon execution by it of an assignment of said mortgage and

the last such offer was made on November 25, 1957. In conjunction therewith deponent also offered to Tanner Associates, Inc., with the consent of all of the other defendants in this cause, that the payment of the amount claimed due on the second mortgage be paid out of the insurance funds upon the execution of an assignment of the mortgage. All of these offers were rejected.

7. This deponent was introduced to a Mr. Burke by his attorney Mr. Kenny and was informed by both of them that Mr. Burke is a member of the bar and a resident of the State of New York and was actually the owner of Tanner Associates, Inc.

8. On behalf of the defendant Marie M. Constant, virtually the only defendant resident of New Jersey, the deponent has and is willing to have the Supreme Court of New York adjudicate the entire matter because it had jurisdiction prior to the United States District Court of New Jersey, had possession of the funds by attachment and said funds will not be charged with substantial unnecessary legal expenses and costs.

NATHANIEL W. FRANZBLAU
NATHANIEL W. FRANZBLAU

(Sworn to by Nathaniel W. Franzblau, December 5, 1957.)

Letter, Annexed to Affidavit

October 22, 1957

The Manufacturers Life Insurance Company
Toronto,
Canada

Re: Policy No. 1,254,339
Menander Constant

Attn: Mr. Thompson, Associate Manager
Claims Department

Dear Mr. Thompson:

I received your letter, dated October 17, this morning, in regard to the above matter.

I have been advised by Mr. Barrett, of your Newark office, that your company would only recognize Albert Barnett Klepper as the beneficiary and assignee of said policy and would make payment to him. In fact, upon receipt of your letter of October 17th, I saw Mr. Barrett, (this morning), and he admitted that was the information he furnished to me. Frankly, I fully realized that that was the only position that your company could take in the matter.

I am now surprised to learn that consideration is being given to a letter written by Mr. Kenny on behalf of Tanner Associates, Inc. If any agreement for collateral security existed in favor of the former mortgagee, it was a personal covenant and certainly does not enure for the benefit of Tanner Associates, Inc.

In your letter, you speak of an Escrow Agreement, and I would be very grateful if you could send me a copy of

that agreement. Any collateral agreement given to the former mortgagee was a personal agreement between the parties and the assignment of the mortgagee would not include any benefits to Tanner Associates, Inc. from the funds of this policy.

Will you please let me hear from you at your earliest convenience.

Very truly yours,

NWF:ama
C.C.—Mr. Barrett

Affidavit of Alexander J. Alexander

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Civil Action File No. 1145—57

—o—

[SAME TITLE]

—o—

State of New Jersey
County of Hudson—ss.:

ALEXANDER J. ALEXANDER, being duly sworn according to law upon his oath deposes and says:

1. I am Vice President of Tanner Associates, Inc., one of the defendants herein and authorized to make this affidavit on its behalf.

2. On February 8, 1956, in order to further secure two mortgage debts which he then owed, one to the defendant herein, Edward Schnur, and one to Abraham and Tillie Weiner, Menander T. Constant absolutely assigned a life insurance policy which was then outstanding on his own life with The Manufacturers Life Insurance Company to Albert Barnett Klepper, one of the defendants herein. The said Albert Barnett Klepper at the same time delivered a letter to Menander T. Constant setting forth the terms on which he received such assignment and appointment of beneficiary. A photostatic copy of such is annexed hereto.

Affidavit of Alexander J. Alexander

3. On October 9, 1957 the aforementioned Abraham and Tillie Weiner assigned all their right, title and interest in the aforesaid mortgage debt, and their interest in the proceeds of such insurance policy, to Tanner Associates, Inc.

4. The said Menander T. Constant died on September 27, 1957 and the proceeds of said policy, in the sum of $25,000. are now fully due and payable.

5. At a conference which I attended in the office of Albert Barnett Klepper, defendant herein, the said Albert Barnett Klepper stated that he did not intend to disburse the proceeds of said insurance policy according to the terms on which he received the assignment of the policy but on the contrary intended to disburse them to some clients of his who were unsecured creditors of the decedent, Constant.

ALEXANDER J. ALEXANDER

(Sworn to by Alexander J. Alexander, November , 1957.)

Affidavit of Albert Barnett Klepper, in Opposition

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 1145/57

—o—

[SAME TITLE]

—o—

State of New York
County of New York—ss.:

ALBERT BARNETT KLEPPER, being duly sworn, deposes and says:

That he is an attorney at law with offices at 82 Wall Street, New York 5, New York, and resides at 1306 East 54th Street, in the Borough of Brooklyn, County of Kings and State of New York.

That on or about November 19, 1957, your deponent's attorney, Andrew J. Dritsas, informed your deponent that he found on his desk a copy of an order to show cause dated November 19, 1957, signed by Hon. Reynier J. Wortendyke, Jr., and a copy of a complaint in interpleader.

That at no time was any process ever served upon your deponent.

No Summons was ever served upon deponent or upon his attorney, Andrew J. Dritsas, except the aforementioned papers which were left on your deponent's attorney's desk.

Your deponent as a resident of the State of New York, does not waive the defense that this Court does not have jurisdiction over him to render judgment in personam; and, asserts there is no equitable basis for the assumption

of jurisdiction by this Court since the Supreme Court of the State of New York, County of Kings has already assumed jurisdiction in a pending action and the interpleader statutes of the State afford the plaintiff as stakeholder ample relief in a binding action.

As a matter of law and as a matter of equity, the Federal Court should decline jurisdiction in view of the following:

That your deponent instituted an action by his attorney, Andrew J. Dritsas, in the State of New York, County of Kings, on October 31, 1957. That on November 1, 1957 the res to wit the sum of $25,000.00 was attached in the action wherein your deponent, as assignee of the proceeds of the Life Insurance policy in the sum of $25,000.00 sought judgment against The Manufacturers Life Insurance Company, the plaintiff in this action. That after the levy was made upon the proceeds of the life insurance policy in the sum of $25,000.00, the plaintiff in this action was served with a summons and verified complaint at Newark, New Jersey on the 4th day of November, 1957.

It is respectfully submitted that said plaintiff in this action could have if it wishes to act in good faith appear in the New York action and obtain whatever equitable relief it desired in the interpleader statutes provided for by the Civil Practice Act of the State of New York.

It is significant to note that orally and in writing Mr. Barrett, the secretary of the Newark office of The Manufacturers Life Insurance Company assured deponent that a check was being mailed in the sum of $25,000.00 up to October 31, 1957. On that date for the first time deponent was informed that The Manufacturers Life Insurance Company had a received a communication in behalf of Tanner

Associates, Inc. by a Mr. Kenny, making a contingent claim of $8,225.83.

To further demonstrate the bad faith of the plaintiff in this action and Tanner Associates, Inc., one of the defendants herein, the fact is undisputed that Eugene P. Kenny, Esq., the attorney for Tanner Associates, Inc., refused to accept the sum of $8,225.83, which was offered to it by Mr. Franzblau, the attorney for Marie M. Constant.

Perusing paragraph "11" of the plaintiff's complaint, the only claim the defendant makes is $8,225.83, and the defendant, Marie M. Constant is willing to make such payment to the defendant Tanner Associates, Inc., the only claimant herein, the sum of $8,225.83 forthwith in exchange for an assignment of a mortgage which Tanner Associates, Inc. now holds.

The refusal to accept this offer by Tanner Associates, Inc. is indicative of their bad faith and this fact is additional ground for the Court in a proper exercise of discretion to refuse to burden deponent with prosecuting two actions, when in fact no one can be prejudiced by the continuation of the prior action now pending in the Supreme Court, State of New York, County of Kings.

It would seem that this Court should decline to invoke its equitable powers by virtue of the fact that three of the four defendants object to the interpleader suit in this Court, and the only defendant desiring that this Court retain jurisdiction, is the defendant Tanner Associates, Inc., a claimant with a tenuous claim.

It is submitted that this Court should give recognition to the number of the defendants objecting to this Court retaining jurisdiction as well as to the amounts involved.

Affidavit of Albert Barnett Klepper, in Opposition

Pro arguendo that Tanner Associates, Inc.'s claim is valid. According to the pleadings before this Court its claim is $8,225.83, and the subject matter in its entirety is $25,000.00. Therefore at least the three defendants represent $16,774.17 who object to the retention of jurisdiction by this Court: and as a matter of fact that there is no bonafide controversy in so far as Tanner Associates, Inc. is concerned, since the defendant Marie M. Constant by her attorney on November 25, 1957 made an offer before the Court to pay in full the alleged claim of the defendant Tanner Associates, Inc.

It is submitted that the proceeds of the insurance policy in the sum of $25,000.00 should not be reduced by having the res subjected to two sets of costs in the two different jurisdictions.

If this Court intends to sign an order retaining jurisdiction and restraining your deponent, then in that event it is requested that this Court in its order make provision extending the time to answer the complaint herein until the determination by the United States Court of Appeals Third Circuit. Within three days after the entry of the order by this Court a notice of appeal will be filed and the appeal prosecuted with dispatch. Therefore it is submitted that no one can complain of any prejudice.

WHEREFORE on the facts as outlined above, it is respectfully submitted that this Court should vacate and dismiss the temporary restraining order and the plaintiff's interpleader should be dismissed with costs.

ALBERT BARNETT KLEPPER

(Sworn to by Albert Barnett Klepper, December 3, 1957.)

Interlocutory Judgment of Interpleader Appealed From

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 1145—57

—o—

[SAME TITLE]

—o—

This matter coming on to be heard on the return of the order to show cause herein dated November 19, 1957, and upon due notice to the defendants, and good cause appearing,

IT IS ORDERED, on this 9th day of December, 1957, on motion of McCarter, English & Studer, attorneys for plaintiff:

1. That the defendants interplead.

2. That the plaintiff be and it hereby is discharged from all further liability with respect to Policy No. 1,254,339, issued by plaintiff under date of July 22, 1953 on the life of Menander T. Constant, as insured, or the proceeds thereof.

3. That defendant Albert Barnett Klepper, his agents and attorneys, be and they hereby are permanently enjoined and restrained from prosecuting the action now pending against plaintiff in the Supreme Court of the State of New York, County of Kings, which action is entitled "Albert Barnett Klepper, Plaintiff against The

Manufacturers Life Insurance Company, Defendant" and which bears index No. 13922, Year 1957.

4. That defendants Albert Barnett Klepper, Edward Schnur, Tanner Associates, Inc., and Marie M. Constant, and each of them, their officers, agents and attorneys, be and they hereby are permanently enjoined and restrained from instituting or prosecuting any proceeding in any state or United States court affecting said Policy No. 1,254,339 or the proceeds thereof.

5. That plaintiff be allowed a counsel fee of Five Hundred Dollars to be taxed out of the fund in court, and that the Clerk of this Court be and he hereby is directed to pay said counsel fee and costs out of the funds deposited in the registry of this Court to the plaintiff's attorneys, McCarter, English & Studer.

WORTENDYKE, JR.
U. S. D. J.

That the time of the defendants Albert Barnett Klepper and Edward Schnur, defendants herein to answer the complaint be extended to 20 days after the determination by the U. S. Circuit Ct. of Appeals of the appeal by said defendants from this order.

Notice of Appeal

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 1145—57

—o—

[SAME TITLE]

—o—

SIRS:

PLEASE TAKE NOTICE that the defendants herein Albert Barnett Klepper and Edward Schnur, hereby appeal to the United States Court of Appeals for the Third Circuit from the judgment of this Court entered December 9, 1957 in favor of the plaintiff, interpleading the defendants, and permanently enjoining and restraining the defendant Albert Barnett Klepper and his attorneys from prosecuting the action now pending against plaintiff in the Supreme Court of the State of New York, County of Kings, and from each and every part of said judgment as well as the whole thereof.

Dated: New York, December 12, 1957.

Yours, etc.,

ALBERT BARNETT KLEPPER

and

EDWARD SCHNUR,
Defendants Pro Se,
82 Wall Street,
New York 5, New York.

To:

McCarter, English & Studer, Esqs.
Attorneys for Plaintiff,
11 Commerce Street,
Newark 2, N. J.

Nathaniel W. Franzblau, Esq.
Attorney for Defendant
Marie M. Constant,
60 Park Place,
Newark 2, N. J.

Eugene P. Kenny, Esq.
Attorney for Defendant
Tanner Associates Inc.,
880 Bergen Avenue,
Jersey City 6, N. J.

Clerk of the United States District Court
for the District of New Jersey.